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No. 45

In the Supreme Court of the United States

OCTOBER TERM, 1929

TAGG BROS. & MOORHEAD, RICHARD M. LAVERTY, ENGAGED IN BUSINESS UNDER THE NAME AND STYLE OF LAVERTY BROS.; WILL H. WOOD ET AL., ETC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, WILLIAM M. JARDINE, AS SECRETARY OF AGRICULTURE; JOHN G. SARGENT, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska (R. 164) is reported in 29 F. (2d) 750.

JURISDICTION

The judgment of the District Court was entered on December 31, 1928. (R. 181 erroneously states this date as December 1, 1928.) Petition for appeal

was filed January 2, 1929 (R. 840), and was allowed on the same day (R. 843).

Jurisdiction of the Court rests on Section 316 of the Packers and Stockyards Act, c. 64, 42 Stat. 159, 168 (U. S. C. Title 7, Sec. 217), making applicable to suits for injunction against orders of the Secretary of Agriculture the procedure provided in the Act of October 22, 1913, c. 32, 38 Stat., 208, 220 (U. S. C. Title 28, Sec. 47), for suits for injunction against orders of the Interstate Commerce Commission. The provisions as to this procedure are incorporated in Subsection 5, Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, Sec. 345). *Stafford* v. *Wallace,* 258 U. S. 495.

QUESTIONS PRESENTED

The questions presented are (1) whether the language of the Packers and Stockyards Act authorized the Secretary of Agriculture to issue his order dated November 19, 1926, fixing the maximum commission charges for buying or selling livestock on the Union Stockyards at Omaha, (2) whether the Act, if it authorized his order, violates to that extent the due process clause of the Fifth Amendment, and (3) whether the rates fixed by the Secretary in his order are not supported by any substantial evidence or are confiscatory.

STATUTE INVOLVED

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 163–167 (U. S. C. Title 7, Secs. 201 et seq.), provides in part as follows:

> SEC. 301. When used in this act—
>
> (a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;
>
> (b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;
>
> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; * * *.
>
> * * * * * *
>
> SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish, upon reasonable request, without discrimination, reasonable stockyard services at such stockyard.
>
> SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

* * * * *

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect;

and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; * * *.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States

and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of

stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

STATEMENT

Appellants are sixteen corporations, nineteen individually owned concerns, and twenty-three partnerships buying and selling livestock for the account of others on the Union Stockyards at Omaha, Nebraska, and registered as market agencies under the Packers and Stockyards Act. (R. 1–2, 53–57.) On January 16, 1926, they filed with the Packers and Stockyards Administration at Washington a schedule of commission charges, designated Tariff No. 2, effective January 26, 1926, cancelling the schedule of charges, designated Tariff No. 1, which had been in effect from September 1, 1923. (R. 10–19.) By an order dated January 25, 1926, the Secretary of Agriculture suspended the operation of Tariff No. 2 for a period of thirty days and notified the appellants of a hearing before an examiner of the Stockyards Administration upon the reasonableness and lawfulness of the rates and charges prescribed in said Tariff and of their right to appear and show cause why a further order in respect to said rates and charges should not be made by the Secretary "in conformity with the provisions of Title III of the Packers and Stockyards Act, 1921." (R. 20–23.) After the Secretary had sus-

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pended the operation of Tariff No. 2 a further period of thirty days (R. 25), the maximum period of suspension authorized by the Act, Tariff No. 2 went into effect.

At the hearing testimony was given by twelve representative commission men (R. 184, 209, 211, 215, 218, 220, 222, 275, 283, 295, 298, 305), six producers of livestock (R. 196, 199, 201, 252, 255, 267) and officers of their associations (R. 201, 226, 252, 267), a buyer for the packers (R. 190) and other buyers (R. 252, 304), traders who buy for a speculative profit on resale (R. 207, 273), the Secretary-Traffic Manager of the Omaha Live Stock Exchange (R. 202), the general manager of the Union Stockyards (R. 192), an editor of a market paper (R. 206), and others (R. 182, 184, 191). An audit for the calendar year 1925 of each of the fifty-nine Omaha commission firms then operating was introduced.[1] (R. 400–699.) The audit was made by fourteen auditors working under the direct supervision of the senior accountant of the Packers and Stockyards Administration. (R. 307, 320.) It showed for each firm the balance sheet at the beginning and end of 1925; the net operating income or loss for the year, with expenses subdivided under twenty or more headings; dividends paid and owners' and partners' withdrawals; the salary as shown on the books of each owner and each employee and the nature and length of his services; total selling

[1] One of the fifty-nine later merged with another and is not an appellant. (R. 1, 53–55, 725.)

commissions and total buying commissions, classified (1) as to species and (2) as to method of arrival and departure—i. e., "straight" railroad cars containing only one species, "mixed" railroad cars containing more than one species, "drive-ins" arriving on foot, "truck-ins" arriving by motor; and the volume per car and per head of livestock sold and bought, classified in the same way.

Appellants' counsel cross-examined witnesses. The only witness called by appellants was the Chief of the Division of Audits and Accounts of the Packers and Stockyards Administration. (R. 182, 254.) After the hearing before the examiner was concluded, appellants through their counsel appeared before the Secretary of Agriculture on October 25th and 26th, 1926, and were given full opportunity of oral argument. (R. 25.)

The evidence presented to the Secretary showed that the commission firms function exclusively as brokers in buying and selling. Their activity begins when the stock is delivered at the yards and put in pens assigned to them. They then sort it into steers, cows, fat cattle sold to packers, stocker and feeder cattle sold to country buyers, etc. After the stock has been watered and fed it is offered for sale. If it is a buyer's market, the buyer seeks the seller; if a seller's market, the seller seeks the buyer. After the stock is sold it is weighed and on the same day the purchaser is billed and remittance is made to the shipper. Freight, feed en route, yardage and feed in the yards, commission charges,

brand inspection, and other charges are deducted from the sales price. (R. 185–186.)

The evidence before the Secretary also showed that appellants were agreed that uniform commission charges are necessary. They function through the Omaha Live Stock Exchange, a voluntary non-profitable association, memberships being individually owned. (R. 381, 798.) The rules of the Exchange prohibit commission charges different from those prescribed by it. (R. 204.)

On November 19, 1926, the Secretary of Agriculture issued his "Conclusion and Order." (R. 23.) He found wide variation among the firms in the volume of business (R. 30), in owners' income therefrom (R. 31), and in the percentage of expenditure for business getting to gross commissions (R. 34). He found that comparison of actual book costs of doing business was valueless as a guide because a few firms operated entirely through employees, while the others operating partly or entirely through owners either set up drawing accounts as salary or did not set up any owner's salary. (R. 32.) He therefore determined the "normal and reasonable" selling cost per car and per head for cattle, hogs, and sheep, allocating expense directly to the three species where possible, and allocating overhead, advertising, etc., on the basis of gross income. (R. 32.) He stated (R. 28–29):

> Therefore, the present problem is approached with the thought that commission rates yielding a reasonable profit above the

normal cost of rendering the service are reasonable.

On the basis of the foregoing and of the entire record he found the rates of Tariff No. 2 "unjust, unreasonable, and discriminatory"; he determined "schedules of just and reasonable charges" and directed appellants not to publish, demand, or collect in excess thereof on and after January 1, 1927. (R. 38–42.)

Three of the appellants thereupon filed a bill in equity in the District Court to restrain enforcement of the Secretary's order, and the other appellants later filed their bill of additional parties. (R. 1, 53.) The court issued a temporary injunction and over the Government's objection referred the issues to a Master and ordered him to take additional testimony. (R. 43, 52.)

At the hearing before the Master appellants introduced numerous exhibits prepared by a firm of auditors employed by them. (R. 722, 726–728.) These exhibits and other evidence introduced by appellants were intended to show 1925 costs computed on various hypotheses and the commissions that appellants would have received if the Secretary's tariff had been applied to their 1925 business. The accuracy of the figures in the Government audit was not attacked.

The Master's report filed July 14, 1928, generally sustained the appellants' contentions. (R. 57.)

The judgment of the District Court, consisting of a circuit judge and two district judges, filed Decem-

ber 31, 1928, dismissed the petition and set aside the temporary injunction. (R. 181.)

SUMMARY OF ARGUMENT

I. The order of the Secretary of Agriculture fixing appellants' maximum commission charges is authorized by the Packers and Stockyards Act. Appellants are market agencies within the meaning of the Act. Subdivision (e) of Section 306 of the Act authorizes the Secretary, upon the filing by market agencies of a new rate schedule and after a hearing, to make "such order with reference thereto as would be proper in a proceeding initiated after it had become effective." Section 310 authorizes a proceeding by the Secretary with reference to existing charges of stockyard owners and market agencies. It provides that if the Secretary, after a hearing, is of the opinion that such charges are or will be unjust, unreasonable, or discriminatory, he may (a) determine and prescribe just and reasonable maximum charges, and (b) make an order that "such owner or operator" shall collect only the charges prescribed. Since the subject matter of the section is regulation of charges of stockyard owners and market agencies, the words in subdivision (b), "such owner," refer to stockyard owner, and the words "such * * * operator" refer to market agency.

Even if subdivision (b) of Section 310 does not include market agencies, the Secretary's determination and prescription of maximum reasonable

charges of market agencies authorized by subdivision (a) constitutes an "order" within the meaning of subdivision (e) of Section 306. Its express provisions are partially nullified if it is construed as not permitting any enforceable order to market agencies.

This interpretation is in harmony with the manifest intent and purpose of the Act to make regulation of charges for stockyard services complete and effective.

II. The authority conferred upon the Secretary of Agriculture to prescribe appellants' maximum commission charges does not violate the due process clause of the Fifth Amendment. *Stafford* v. *Wallace, supra,* held that supervision of commission men under the Packers and Stockyards Act was authorized by the Commerce Clause. The Court referred to exorbitant or unreasonable stockyard charges as an undue burden on commerce. In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 34, the Court said that *Stafford* v. *Wallace* presented the question whether the Secretary of Agriculture could prevent the abuse of exorbitant charges by commission men.

Rate regulation of an industry affected with a public interest is appropriate, and therefore not a violation of due process. The commission business of appellants is affected with a public interest because of its vital importance to interstate commerce and its monopolistic character.

Prescription of appellants' maximum commission charges is not wage fixing, and the power to regulate rates is not destroyed because the capital employed is small, wages and salaries are the principal cost item, or much of the service is performed by owners.

III. The Packers and Stockyards Act parallels the Interstate Commerce Act. It has been held under the latter that the Court will not substitute its judgment for that of the Commission in the determination of reasonable rates, but that it will consider whether the decision of the Commission can be supported by the evidence or whether it is confiscatory. In this case the evidence in support of the Secretary's determination includes a detailed financial audit of each firm affected and extensive evidence covering the history and practical operation of the commission business. Substantial evidence supports his subsidiary findings as to reasonable operating cost.

It is well settled that the Court will not enjoin rates attacked as confiscatory before they have been put into operation unless a case for relief is clearly proved. *Aetna Insurance Company* v. *Hyde,* 275 U. S. 440, held that evidence of the effect of rates upon the aggregate business of an entire industry does not establish confiscation unless supplemented by proof that each concern affected was efficiently operated. In this case there is no convincing proof of reasonably efficient operation by any of appellants. In addition, the exhibits purporting to show the confiscatory effect of operation under the

Secretary's rate schedule are incomplete, speculative, and misleading.

ARGUMENT

I

THE ORDER OF THE SECRETARY OF AGRICULTURE IS AUTHORIZED BY THE PACKERS AND STOCKYARDS ACT

Appellants contend that the meaning of the "order" authorized by Section 306 of Title III of the Packers and Stockyards Act is to be found in Section 310 of said Title, that the only order authorized by Section 310 is found in subdivision (b), and that this subdivision does not authorize an order to market agencies. The conclusion is that even if the only lawful charges are those prescribed by the Secretary, the appellees should be enjoined from enforcing them or attempting to put them in operation.

Section 306, subdivision (a), requires every market agency to file with the Secretary schedules showing all charges for stockyard services. Under Section 301 appellants are market agencies and the term "stockyard services" includes buying or selling livestock at a stockyard on a commission basis.

Section 306, subdivision (e), provides that whenever any schedule showing a new charge is filed with the Secretary, he may upon his own initiative enter upon a hearing concerning its "lawfulness," may suspend it for thirty days, and

> * * * after full hearing, whether completed before or after the rate, charge, regu-

> lation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.

The proposed change of rate or charge then goes into effect, if after a further suspension of thirty days the proceeding has not been concluded and an "order" made.

Section 305 declares unlawful any unjust, unreasonable, or discriminatory charge by a market agency for stockyard services.

Section 310 provides that whenever the Secretary after a hearing is of the opinion that any rate or charge of a "stockyard owner or market agency" in connection with the furnishing of stockyard services is or will be unjust, unreasonable, or discriminatory, he (a) may determine and prescribe what will be the just and reasonable maximum rate or charge to be thereafter observed "in such case," and (b) "may make an order that such owner or operator" shall cease from "such violation" to the extent found by the Secretary and shall not thereafter publish, demand, or collect any rate or charge in excess of that "so prescribed."

The subject matter of Section 310 is regulation of charges for stockyard services by a "stockyard owner or market agency." The first portion of the section states when the Secretary may act; subdivisions (a) and (b) state how he may act. The words in subdivision (b), "such owner or operator," must be considered in connection with the application of

the entire section. So read, "such owner" refers back to "stockyard owner" and "such * * * operator" refers back to "market agency."

Moreover, even if subdivision (b) had the limited meaning assigned to it by appellants, the Secretary's determination and prescription of just and reasonable maximum charges under subdivision (a) constitutes an order within the meaning of Section 306. Section 306, subdivision (e), authorizes "such order" with reference to the lawfulness of proposed new charges of market agencies "as would be proper in a proceeding initiated after it had become effective." The section thus authorizes an order. The kind of order authorized is determined by reference to Section 310. If subdivision (b) is inapplicable, subdivision (a) at least applies and provides for determination and prescription of just and reasonable maximum commission charges to be thereafter observed by market agencies. Any other construction means that no order as to charges of market agencies may be made under Section 306, although the section expressly provides for such an order.

Subdivisions (f), (g), and (h) of Section 306 provide machinery for enforcing orders made under subdivision (e). Subdivision (f) prohibits any market agency from carrying on business unless the charges for stockyard services have been filed "in accordance with this section and the orders of the Secretary made thereunder." Subdivisions (g) and (h) provide penalties in case any one "fails to com-

ply with the provisions of this section or of any regulation or order of the Secretary made thereunder." Since the Secretary's determination of just and reasonable charges of market agencies for stockyard services, including buying and selling at a stockyard on a commission basis, is an order authorized by subdivision (e) and is made fully enforceable by subdivisions (f), (g), and (h), appellants' claim for injunctive relief fails.

Appellants' construction of Title III of the Act is contrary to its intent and purpose. This Title regulates practices and charges at the stockyards affecting interstate commerce in livestock and, more particularly, practices and charges of stockyard owners and market agencies. It is expressly made enforceable against market agencies by suit for injunction (Section 315) and suit for penalties (Section 314). A construction which would leave the vital matter of commission charges free from enforceable regulation is inconsistent with the manifest intent to make regulation of stockyard services complete and effective.

The legislative history of the Act confirms this view. The report of the Committee (House Report 77, 67th Cong., First Session) on H. R. 6320 said of Title III as a whole (p. 10):

> The Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads, including the power, after full hearing, to es-

tablish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services.

II

THE AUTHORITY CONFERRED BY THE PACKERS AND STOCKYARDS ACT TO PRESCRIBE MAXIMUM COMMISSION CHARGES FOR BUYING AND SELLING LIVESTOCK PASSING IN INTERSTATE COMMERCE THROUGH A PUBLIC STOCKYARD IS NOT CONTRARY TO THE FIFTH AMENDMENT

Stafford v. *Wallace*, 258 U. S. 495, involved the constitutionality of the Packers and Stockyards Act so far as it provided for supervision of the business of the commission men and of the livestock dealers in the great stockyards of the country. This case came before the Court on bills seeking to restrain enforcement of orders of the Secretary of Agriculture regulating the business of the commission men and of the dealers at the Chicago stockyards.

The Court held that activities of the commission men and dealers in the large stockyards regulated by the Act are a necessary incident of the stream of commerce from one part of the country to another and are, accordingly, subject to the regulatory power of Congress under the Commerce Clause. The Court said (p. 516):

> The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers.

In summarizing the evils which Congress sought to provide against by the Act, the Court called attention to the effect of unreasonable charges by commission men or other market agencies on interstate commerce as follows (p. 515):

> Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate.

In the case of the traders one of the assignments of error was that the Act violated the Fifth Amendment. (R. 28, No. 691, October Term, 1921.) While the Court's opinion states that the only constitutional objection seriously pressed was that based on the Commerce Clause, the power to regulate under the Commerce Clause was sustained because of the effect on interstate commerce of improper practices and unjust or unreasonable charges of market agencies. If, therefore, the power of Congress to regulate market agencies was grounded, in part at least, on the right to prevent unreasonable charges by such agencies, the decision in *Stafford* v. *Wallace* necessarily sustained the validity of the Secretary's power to regulate their charges.

This was the view of the District Court in this case. It said (R. 165):

> I think that the issues in the *Stafford case* presented for the court's consideration the

> question of the Secretary's power to fix the rates of the market agencies and that the language used in the opinion and the later opinion—*Board of Trade* v. *Olsen,* 262 U. S. 1, 34—indicates a conclusion reached by the supreme court in favor of the existence of the power of the Secretary.

In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, the Court referred to *Stafford* v. *Wallace* as follows (p. 34):

> That case presented the question whether sales and purchases of cattle made in Chicago at the stockyards by commission men and dealers and traders under the rules of the stockyards corporation could be brought by Congress under the supervision of the Secretary of Agriculture to prevent abuses of the commission men and dealers in exorbitant charges and other ways, and in their relations with packers prone to monopolize trade and depress and increase prices thereby.

Assuming, however, that *Stafford* v. *Wallace* upheld only the power of general supervision over market agencies and did not decide the validity of rate regulation, the question is whether this is an appropriate exercise of the regulatory power in view of the nature of the business, the features which touch the public, and the abuses reasonably to be feared. As said in *Wilson* v. *New,* 243 U. S. 332, with respect to the authority to regulate interstate commerce (p. 346):

> It is equally certain that where a particular subject is within such authority the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation.

The business of the commission men is one affected with a public interest. It serves all the public, it is essential to the movement of interstate commerce, and it has a monopolistic control over prices.

The commission men hold themselves out as serving all comers and by the terms of the Packers and Stockyards Act (Sec. 304) they are required to serve all without discrimination.

The commission men are essential in making the sales without which the flow of the current of commerce in livestock from the West to the East, and from one State to another, would be obstructed. Thousands of head arrive daily by train, motor, or on foot and must be promptly sold and moved out to make room for the next day's arrival. The shippers, who are ordinarily far away, are dependent on the commission men.

There is but one great public stockyard in Omaha, and appellants have a practical monopoly of the business. The only two independents operating in 1926, one of which was a cooperative, handled less than 7% of the volume of business in cars in that year. (R. 758.) Furthermore, appellants fix their charges by agreement among themselves and not as the result of competition. (*Supra*, p. 10).

In *Stafford* v. *Wallace, supra,* the Court, after discussing the close relationship of the market agencies to the movement of livestock in interstate commerce through the stockyards, said (p. 516):

> The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois,* 94 U. S. 113.

In *Tyson & Brother* v. *Banton,* 273 U. S. 418, 439–440, the Court cited the stockyards as an example of a business affected with a public interest.

Stockyards are the place where the producers dispose of their livestock. At Omaha the Stockyards Company furnishes the physical facilities and the commission men and other market agencies make the sales without which these physical facilities would be useless and inoperative. In short, the business of the stockyards which is affected with a public interest comprises that of the company which owns the yards and that of the commission men who function thereon in making the sales for which the yards are equipped and provided.

Businesses affected with a public interest have been divided into three classes, (1) those carried on

under the authority of a public grant, (2) those historically recognized as such, and (3) those which though not public at their inception have become such because of their peculiar relation to the public. As to the third class the Court in *Wolff Company* v. *Industrial Court,* 262 U. S. 522, said (p. 538):

> In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

The business of the commission firms is squarely within this language. The indispensable nature of their service is not disputed and their monopolistic control over rates might, if unregulated, subject the public to exorbitant charges and arbitrary control.

Munn v. *Illinois,* 94 U. S. 113, the leading case upholding regulation of a business which has become public, turned upon these same features. In the *Sinking-Fund Cases,* 99 U. S. 700, the Court referred to the *Munn* case as follows (p. 747):

> The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a

> tribute can be exacted from the community, it is subject to regulation by the legislative power.

That the State may regulate rates of a business affected with a public interest needs no citation. It is immaterial that such regulation involves interference with the right to contract (*German Alliance Insurance Company* v. *Kansas,* 233 U. S. 389) or interference with preexisting contract rights (*Sutter Butte Canal Company* v. *Railroad Commission,* 279 U. S. 125).

Two lines of cases are cited in support of the alleged unconstitutionality of the power to regulate the maximum charges of appellants—(1) those involving a statute fixing charges in businesses not affected with a public interest and (2) those involving what may be termed a wage-fixing statute.

Leading cases of the former type are *Tyson & Brother* v. *Banton, supra,* involving a statute limiting resale price of theatre tickets by ticket brokers; *Ribnik* v. *McBride,* 277 U. S. 350, involving a statute regulating charges of employment agencies; and *Williams* v. *Standard Oil Company,* 278 U. S. 235, involving a statute regulating the sales price of gasoline. In these cases the only basis for rate regulation was that the business was affected with a public interest, and when the Court made a contrary determination the rate regulation fell. They do not apply to this case where Congress under the Commerce Clause regulates a business affected with

a public interest and therefore one for which rate regulation is appropriate.

Analysis of cases involving a so-called wage-fixing statute shows that they do not apply to this case.

Adkins v. *Children's Hospital,* 261 U. S. 525, held unconstitutional a minimum wage law applying to women and minors. The Court cited as one kind of case where freedom of contract might be constitutionally abridged, "statutes fixing rates and charges to be exacted by businesses impressed with a public interest." (P. 546.) The Court said that the law under consideration did not deal "with any business charged with a public interest." (P. 554.) The case was disposed of on the basis that the police power of the State to regulate health and morals did not justify the statute.

In *Wolff Company* v. *Industrial Court, supra,* a meat packing company attacked a statute which provided that in case of a dispute as to wages between employer and employees in a plant manufacturing food for human consumption an agency of the State might fix wages, and thereafter the employer was compelled to pay such wages and the employees prohibited from striking against them. The Court said that the classification of the business as public was at best doubtful and that the theory and purpose of the statute was to compel continuity of employment. It therefore held that in so far as it permitted the fixing of wages in

the packing company's plant, it violated the due process clause.

Wilson v. *New, supra,* held that when Congress was confronted with a national emergency by reason of a threatened strike of railroad employees and the consequent possible stoppage of the country's transportation system, it could constitutionally fix the wages of railroad employees for a reasonable time to enable them to agree.

The regulation of maximum commission charges under the Packers and Stockyards Act is not wage-fixing either in form or in substance.

Under the Act the Secretary of Agriculture may determine charges for the brokerage *service* of selling livestock just as under the Interstate Commerce Act the Commission may determine charges for transportation service. In either case the service performed, the charge for which is regulated, requires the use of property and of personal services.

Appellants' argument erroneously assumes that their brokerage service does not involve the use of property, and that therefore regulation of its charges impinges directly on personal services. Appellants employ property, and very valuable property, in the conduct of their business. The yards of the Stockyards Company, its office building, its facilities for watering, feeding, and weighing livestock are all actively used. If the Stockyards Company itself conducted the commission

business, a return on the capital employed would be part of the cost of doing the commission business, and there would be no question of fixing wages. The power of the public to regulate is not lost because most of the property and facilities used in the business are leased, rather than owned, by those engaged in it. Some of the charges of the Stockyards Company are passed on directly to the shippers; the balance, including rent, are among the costs of doing business taken into consideration in determining reasonable charges.

The Secretary's order is not wage fixing because wages and salaries are the largest single item of expense. The Secretary's rates prescribe the maximum charges for a business carried on, like other businesses, through the use of property and the complementary services of numerous individuals. Within the limits of the charges thus fixed, just as prior thereto when all commission charges were uniform, efficient employees will compete with the inefficient and will be paid according to their worth, while efficient owners will compete with the inefficient and will receive a return in profits commensurate with their business capacity.

The Secretary's order is not wage fixing because much of the service is performed by owners. In determining the cost of doing business allowance must, of course, be made for owners' services, but this concerns the proper amount of maximum rates, not the power to determine them. If the feature of owners' services were determinative of the power

of rate regulation, then commission firms operating entirely through employees would be subject to regulation, while those operating partly or entirely through owners and performing precisely the same service would be free to dictate their charges.

III

THE MAXIMUM COMMISSION CHARGES FIXED BY THE SECRETARY OF AGRICULTURE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEY ARE NOT SHOWN TO BE CONFISCATORY

Title III of the Packers and Stockyards Act closely parallels the Interstate Commerce Act. Under the latter Act the Court has held that it will consider whether the Commission acted within its statutory power, whether its findings are supported by some substantial evidence, and whether the rates fixed are confiscatory, but that it will not consider whether upon the same facts it would reach precisely the same conclusion.

Interstate Commerce Commission v. *Union Pacific Railroad*, 222 U. S. 541, presented the question whether certain rates fixed by the Interstate Commerce Commission were reasonable. In sustaining the Commission and reversing the lower court, Mr. Justice Lamar, speaking for a unanimous court, said (p. 547):

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of

> the order, or whether, on like testimony, it would have made a similar ruling.

and further (pp. 547–548):

> Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

See also *Assigned Car Cases,* 274 U. S. 564, 580; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62; *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452, 470.

In this case the Secretary's rate determination is supported by substantial evidence. In addition to the detailed financial audit of each of the firms affected by his order there was extensive evidence covering the history and practical operation of appellants' business.

Appellants contend, however, that the Secretary's subsidiary findings as to the normal cost of salesmanship and of business getting are so unreasonable and arbitrary that the Court should hold that his determination of maximum charges is not supported by adequate evidence. Since the test applied by the Secretary was a reasonable profit above "the normal cost of rendering the service" (R. 29), it is argued that any error in determining

the proper amount of any cost factor invalidates his determination of maximum charges.

Appellants' conclusion does not follow from their premise unless they also demonstrate both that the Secretary's finding as to the total normal cost of doing business is not supported by substantial evidence and that his allowance for reasonable profit does not provide a margin sufficient to cover any proved inadequacy in his finding as to total cost. Irrespective of these considerations, however, the Secretary's subsidiary findings as to the separate cost factors of the business are fully supported by the evidence.

The appellants attack the Secretary's finding as to the cost of salesmanship. He found that the fair market value per year of the services of a good salesman who had opportunity for the full exercise of his ability was $5,000 for cattle and sheep and $4,000 for hogs. (R. 34.) The following facts as to salaries of employee salesmen taken from the Government audit and recited in the Secretary's Conclusion and Order show that these findings represent approximately the maximum market value of salesmanship (R. 33–34):

> Only four of the 39 employee cattle salesmen received $5,000 or more; 16 of these 39 received less than $3,000. Of the 9 employee sheep salesmen only three received salaries of $5,000 or more; four of these 9 received less than $4,000 a year. Of the 25 employee hog salesmen only five received salaries of

more than $4,000; 15 of these 25 received less than $3,000 per year.

The Secretary's determination of per car cost of salesmanship is $5 for cattle and sheep and $3 for hogs. This assumes that a cattle or sheep salesman worth $5,000 per year could handle 1,000 cars a year and a hog salesman worth $4,000 per year could handle 1,333 cars per year.

There was evidence that a salesman could handle efficiently a larger volume per year. (R. 262, 266.) Although the Secretary assumed a larger volume than the average volume handled by salesmen in 1925, the correctness of his determination of per car cost of salesmanship depends upon a correct relationship between a salesman's worth and the volume which he could handle. In other words, the selling cost per car is the same if on a yearly basis a salesman worth $5,000 handles 1,000 cars, or a salesman worth $4,500 handles 900 cars, or a salesman worth $4,000 handles 800 cars. Since the Secretary adopted approximately the maximum market worth of salesmen, a fair determination of per car cost required him to adopt approximately maximum volume.

The complete adequacy of the Secretary's determination of selling cost is shown by the testimony before the Master of the manager of one of the large commission firms that he could get salesmen for $6,000 who would sell efficiently 3,000 cars per year; that if a salesman sold less than 3,000

cars per year, presumably his salary would be scaled off accordingly; that a salesman should not sell less than 3,000 cars a year on the basis of a $6,000 salary; and that he would expect a salesman to whom his firm paid a $6,000 salary to handle 3,000 cars a year. (R. 794–795, 798.) This testimony shows a per car cost for salesmanship of only $2 as against the Secretary's finding of $5 for cattle and sheep and $3 for hogs.

Appellants also contend that the Secretary's finding as to the normal cost of travel, entertainment, advertising, etc., on the basis of something more than 10% of the average gross commissions received in 1925 (R. 35), is contrary to the evidence because substantially less than the actual expenditures under this head in 1925 (Exhibit 104, R. 798).

There was testimony that commission firms, who do not compete with each other in prices, wastefully directed competitive effort toward business getting, both through soliciting business and through sending shippers market letters and a market paper (R. 234, 235, 245, 260, 265), whereas all market information reasonably required was available through the daily papers. (R. 243.) The rules of the Omaha Live Stock Exchange indicate that the commission business had been forced to contend with abuses in soliciting and in "services" for shippers. The rules limit the length, period and character of soliciting, requiring solicitors to register on departing from and on returning to Omaha (R.

390), and prohibit paying for shippers' telephone and telegraph messages (R. 391) or meals (R. 394). The Secretary's Conclusion and Order says with respect to advertising and soliciting (R. 35):

> a very substantial part of the expenditure does not result in bringing new business to the market, but in shifting consignments from one commission man to another, and * * * the stockyards company also undergoes expenditures for advertising, all of which * * * must ultimately be borne by the producers of livestock * * *.

Finally, appellants contend that the rates are confiscatory. In this connection the burden rests on them to establish a clear and convincing case.

Where rates are attacked as confiscatory before they have been put into operation, this Court has repeatedly said that it would act only if a case for relief has been clearly proved. If the evidence leaves the confiscatory character of the rates in doubt, the Court will not enjoin them.

In *San Diego Land Co.* v. *National City,* 174 U. S. 739, the Court said (p. 754):

> judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

In *Knoxville* v. *Water Co.*, 212 U. S. 1, the Court said (p. 16):

> If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States.

In *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, Mr. Justice Butler, speaking for the Court, said (pp. 447–448):

> Jurisdiction of this Court to set aside state-made rates as confiscatory will be exercised only in clear cases. And the burden is on one seeking that relief to bring forward and satisfactorily prove the invalidating facts. *Chicago, &c. Ry. Co.* v. *Wellman*, 143 U. S. 339, 344–345; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 441, 446; *Knoxville* v. *Water Co.* 212 U. S. 1, 8, 16; *The Minnesota Rate Cases*, 230 U. S. 352, 433, 452; *Brush Elec. Co.* v. *Galveston*, 262 U. S. 443, 446.

In the usual case involving confiscatory rates the test applied is a fair return upon the value of the property used in the business. In this case the Secretary allowed an adequate return on the property invested, compensation for reasonable operating expense, and a reasonable profit.

The Secretary allowed 50¢ a car as interest on the property investment. (R. 36.) Since 127,811.99 cars or their equivalent were handled in 1925 by fifty-seven firms (Exhibit 103, R. 798), $63,906 would be allowed on the basis of the 1925 business, although a 7% return on the actual book investment on December 31, 1925, of fifty-nine firms (R. 35), would be only $54,009.97, or a margin of over $9,896.03 allowed in the Secretary's order.

Appellants contend that the Secretary's order erroneously fails to provide for going-concern value. The leading case of *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 165, refers to going-concern value as—

> the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business.

And again—

> an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced.

The organization necessary to set a gas, waterworks, or electric-lighting plant in efficient operation is necessarily complex, and when completed, has definite value. The organization necessary to start a commission firm in efficient operation may be accomplished by hiring two or three experienced salesmen and any other necessary employees, such as a yardman and a bookkeeper. The nature of the commission business, therefore, raises no pre-

sumption that existing firms have a going concern value and proof of actual going value is totally lacking. One of the Master's findings of fact was that the record does not contain evidence from which going concern value could be accurately determined. (R. 109.) Good will, representing "that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business," has no place in the fixing of valuation for the purpose of rate making of monopolistic public-service corporations. *Des Moines Gas Co.* v. *Des Moines, supra,* at pages 165 and 169.

Appellants also attack the validity of the Secretary's order on the ground that it does not take into account the alleged value of certain exchange memberships (Appellants' Exhibit 107, R. 798) not set up on appellants' books in 1925 and therefore not included in the Government audit. Although appellants at the time of the hearing before the Secretary were served with copies of the Government audit and had an opportunity to introduce evidence of items not on the books, they did not do so. Exhibit 107 was offered in evidence at the hearing before the Master. (R. 722.) The exhibit therefore can not be used to show that the Secretary's order is invalid as contrary to the evidence, but is relevant, if at all, only upon the issue of whether the Secretary's rates are confiscatory.

Exhibit 107 assumes a fair market value of $4,000 for an exchange seat. This value is based on the

following testimony of one of the accountants of the firm of auditors employed by appellants (R. 721):

> Exhibit 107 shows the details of all memberships, including those set up and those not set up, the parties to whom they were issued, and their value on the basis of $4,000 per membership which was a fair value for 1925.

The testimony of this witness (R. 715–726) does not show his competency to determine the fair market value of exchange seats or what factors he considered in arriving at his determination of value. Appellants' witnesses did not attempt to reconcile this $4,000 valuation with the average book value of those memberships which were on the books. Exhibit 107 shows 73 such memberships with a total book value of $152,020 (firm No. 31 omitted because records not available), or an average book value of about $2,080.

It is submitted that the evidence in the record falls far short of the clear and convincing proof required if a $4,000 valuation of exchange seats is to be made the foundation for a finding of confiscatory rates.

Even if the Court should accept appellants' claim to a total additional investment of $312,000 in exchange memberships, seven per cent of this amount is $21,840. Against this must be offset the excess interest of more than $9,896.03 allowed in the Secretary's order (*supra*, p. 36), leaving less than $12,000 cost, or about 9¢ a car on the basis of

1925 business, deductible from the margin of profit allowed in the Secretary's order.

Appellants further contend that the Secretary's schedule omits basic cost items essential to the formation of a valid rate basis, namely, depreciation, bad debts, and supervision. Appellants do not show, however, that these items were not included in the Secretary's allowance for overhead. (R. 35.)

Appellants' Exhibit 106 (R. 798), offered in evidence at the hearing before the Master (R. 722), computes 1925 depreciation of $6,194.92 not set up on the books in 1925 and not included in the Government audit. This is less than 5¢ a car on the basis of 1925 business.

Appellants have not denied that the commission business is on a cash basis, but refer (page 31 of brief) to the testimony of a witness that bad debts are an occasional source of loss necessarily incident to the business. No evidence was offered to show that any 1925 bad debts disallowed as operating expense in the Government audit arose as a necessary incident to the commission business. The loans which some commission men made to shippers prior to 1925 were not a part of the commission business, and bad debts resulting from such loans were properly disregarded in the Government audit.

The profit which the Secretary allowed over his normal cost of rendering the service was fully compensatory. The following summarizes his determination of normal cost per car and of maximum

selling commissions per car, and the resulting net profit per car, the figures reflecting straight cars, single ownership, single decks of cattle and hogs, and double decks of sheep (R. 35, 38–39):

	Cattle	Hogs	Sheep	Total, all species
Commissions	$15.00	$12.00	$18.00	$45.00
Cost	13.25	9.85	13.05	36.15
Profit	1.75	2.15	4.95	8.85

By way of illustration, for one car of each species the total commissions would be $45 and the total profit therefrom $8.85, or a ratio of profit to commission of 19⅔%. While none of the appellants handles exactly the same number of cars of each species, practically all of them do handle all three species. The ratio of profit to commissions in the case of any single firm during any stated period will vary with the relative number of cars of each species handled; if an equal number of each, the ratio of profits to commissions will be 19⅔%; if more of sheep than hogs or cattle, the ratio will be still higher; if more of cattle than of hogs or sheep, the ratio will be lower but always above the ratio of profit to commissions on cattle alone. There is thus a variable spread between the Secretary's rates and his determination of cost which will absorb any minor cost items not brought to his attention. The court below said (R. 176):

> It is hardly to be imagined that every possible cost of every one of the fifty-nine dif-

ferent concerns examined by the Secretary would be specifically referred to and covered in such an order as made by the Secretary. But where, as in this case, the rate maker has provided a margin and spread for such contingencies the courts must keep hands off until there has been practical application.

Appellants' contention that the Secretary's rates are confiscatory is based primarily on Exhibits 103, 104, and 105. (R. 798.)

Exhibit 103 shows the commissions under the Secretary's order applied to the 1925 business.

Exhibit 104 computes total 1925 operating cost by taking actual cost as shown by the Government audit, adding thereto additional rent, interest at 7% on the 1925 property investment shown by the books, and $5,000 per year for owners acting as cattle or sheep salesmen and $4,000 per year for owners acting as hog salesmen. The book salaries of such owners are eliminated. (R. 718–719.)

Exhibit 105 compares commission income shown in Exhibit 103 with total operating cost shown in Exhibit 104.

This Court recently passed upon an attack *en masse* by an entire industry on rates alleged to be confiscatory. *Aetna Insurance Company* v. *Hyde, supra,* involved a statute of Missouri authorizing the superintendent of insurance under certain conditions to reduce the rates of fire insurance companies doing business in the State so that there aggregate collections in the State should not yield more

than a reasonable profit. The Superintendent of Insurance having reduced rates 10%, all the companies affected brought a proceeding to review his order on the ground that it violated the due process clause.

This Court held that no Federal question was presented. It said that the case as presented in the pleadings did not show that the reduced rates were confiscatory as to any company. The Court wholly rejected as evidence of confiscation the effect of the rates on the aggregate business of all the companies, holding that this evidence did not show confiscation unless coupled with proof that all the companies operated efficiently. It said (p. 448):

> And it fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies.

It also said (p. 447):

> It has never been and can not reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.

It follows that a case of confiscation can not be built up from totals in Exhibits 103, 104, and 105 which reflect results for the entire industry. And

even assuming that the results therein shown for individual firms are correct, there is not the further necessary proof that any of them are "so well and economically organized and carried on" that they can invoke the protection of the due process clause. Mere general statements by certain owners that all expenditure was necessary and reasonable, and that management was efficient, are not sufficient.

The evidence of large aggregate expenditure and variation in expenditure for business getting, having little economic value, overcomes any possible presumption that might otherwise exist that all actual expenses were reasonable and justified.

Finally, Exhibits 103, 104, and 105 are incomplete, speculative, and misleading.

The fourth column of Exhibit 103 shows the commissions under the Secretary's order applied to the 1925 business if dealers and speculators were charged only one-half commissions, as had been the previous practice. Certain commission men expressed the opinion that many traders and speculators could not operate if charged full commissions and two speculators testified that they would go out of business if charged full commissions. From this evidence the conclusion is drawn that as a matter of business necessity appellants would not charge traders and speculators the full commissions allowed in the Secretary's order. The evidence and the conclusion are highly speculative. The

fourth column of Exhibit 103 and computations based thereon must therefore be rejected.

Exhibit 103 does not include operating income other than commissions, whereas the commission income shown in Exhibit 103 is compared in Exhibit 105 with all operating expense.

Exhibit 104 includes all expense for business getting, whether justified or not. It also assigns to all owner salesmen approximately the maximum salaries of salesmen. In these two important respects it is misleading.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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